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In the

Supreme Court of the United States

October Term, 1958

No. [redacted] 89

DALLAS GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL NO. 745,

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

L. N. D. WELLS, JR.,
1610 National Bankers Life Bldg.,
Dallas 1, Texas.
DAVID PREVIANT,
511 Warner Theatre Bldg.,
Milwaukee 3, Wisconsin.
HERBERT THATCHER,
Tower Building,
Washington, D. C.,
Counsel for Petitioners.

MULLINAX WELLS & MORRIS,
GOLDBERG, PREVIANT & COOPER,
Of Counsel.

June 2, 1959.

WARLICK LAW, INC.—1207 HORD STREET—DALLAS—RI 1-6711

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NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Dallas General Drivers, Local 745, a labor union, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on March 12, 1939, enforcing, in part, an order of the National Labor Relations Board against petitioner.

CITATION TO OPINIONS BELOW

The decision and order of the National Labor Relations Board (R. 70)[1] is reported at 118 NLRB 1251, and is printed in Appendix "B" hereto, *infra*, p. 37. The dissenting opinion appears at p. 47, *infra*.

The Opinion of the Court of Appeals is reported at *264 F. 2d 642*, and is printed in Appendix "A" hereto, *infra*, p. 25.

JURISDICTION

The Opinion of the Court of Appeals was rendered March 12, 1959; the decree enforcing in part the Order of the National Labor Relations Board was entered April 10, 1959. See Appendix C, p. 57 *infra*.

The jurisdiction of this Court is invoked under *28 U. S. C.*, Section 1254(1) and Section 10(e) of the Labor-Management Relations Act of 1947, as amended.

[1]The reference "R" designates the printed "Transcript of Record" filed in the Court of Appeals. The reference "B.A." designates the "Appendix to Petitioners' Brief" in the Court of Appeals.

QUESTIONS PRESENTED

1. Do employees in dispute with wholesaler violate Section 8(b)(4)(A) of the Labor Management Relations Act by urging the consuming public not to purchase wholesaler's product by picketing consumer entrances[2] to retail outlets through which wholesaler's goods are distributed?

2. May NLRB infer solely from the fact of picketing at *consumer* entrances to retail stores that such picketing, regardless of the message communicated by the pickets, and regardless of attempts by the picketing union to limit its picketing to *consumers* as distinguished from *employees*, "necessarily invites *employees* to make common cause with strikers" and "constitutes inducement of *employees* within the proscription of Section 8(b)(4)(A) of the Act," where:

A. The legend on the picket sign was clearly directed only at consumers, and specified that no inducement of employees was intended.

B. The timing of the picketing came immediately after employer appeal to the consuming public.

C. The location of the pickets was at public entrances, and not at delivery entrances.

D. Picketing at any other point could not reach the consumer.

---

[2] "Consumer entrances" as used throughout this petition refer to the public entrances to retail grocery stores opening at the front of each such store onto the public sidewalk and, used principally by customers entering the store for the purpose of purchasing groceries at retail for home consumption.

"Consumer entrances" are to be distinguished from "delivery entrances" at the rear of each store. No pickets appeared at the delivery entrances.

Although deliveries are principally made through the "delivery entrances" at the rear of the store, the record shows that the "consumer entrances" are also sometimes used by store employees and employees of suppliers. R.101-102,B.A.16. It was stipulated (B.A.16) "that the stores named * * * in the complaint have one or more entrances at the front part of the store used by customers and employees and one or more entrances elsewhere used for deliveries."

E. Union advised the representatives of store employees that picketing was not directed at employees.

F. No employees were in fact induced to strike or other concert of action.

G. Many *consumers* reading the picket signs refused to enter the retail stores; no *employees* refused to do so?

3. Does an order to cease and desist from peaceful picketing at consumer entrances to retail stores in the circumstances set forth in question two above:

A. Deprive employees of rights of free speech guaranteed by the First Amendment to the Constitution?

B. Deprive employees of the "right to * * * assist labor organizations * * * and to engage in * * * concerted activities for the purpose of mutual aid or protection * * * " guaranteed by Section 7 of the Act, 29 U. S. C., Sec. 157?

4. Does a union violate Section 8(b)(4)(A) of the Act by picketing the retail members who wholly own and control the wholesale cooperative with which union is in dispute, where:

A. The Act prohibits only actions "where an object thereof is * * * forcing or requiring * * * any employer or other person to cease * * * dealing in the products of any *other* producer * * * or to cease doing business with any *other* person"?

B. The retail cooperative members had further allied themselves with the wholesale cooperative by performing certain of the work which the latter was unable to do because of the strike?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the First Amendment to the Constitution, printed in Appendix D, *infra*, p. 62.

The pertinent provisions of the Labor Management Relations Act of 1947, as amended (61 Stat. 136, 29 U. S. C. A., 151 et seq.) particularly Sections 7 and 8 (b) (4) and 8(c) are printed in Appendix E, *infra*, p. 63.

STATEMENT OF THE CASE[1]

Union, the certified bargaining representative of Associated's employees, struck in protest against Associated's refusal to agree to institute wage standards obtaining throughout the industry. Picketing of Associated's warehouse in the industrial area in Dallas, while effective in advising prospective strikebreakers of the existence of the labor dispute, was ineffective to advise the consuming public of the facts of the labor dispute. (R. 71 ff.; 83 ff.)

Associated's products, bearing the "Shurfine" label are distributed to the consuming public only through retail grocery stores. Associated distributes only through its "member" stores—independent retail grocers holding varying amounts of Associated's capital stock, but each retailer limited to one vote regardless of amount of stock held. These "member" retail stores annually elect nine directors who are vested with complete control and management of the affairs of Associated. (R. 95; 81 ff.)

Union picketed several of the member stores with banners addressed to the "Public only (not directed to em-

[1] Dallas General Drivers, Warehousemen and Helpers, Local Union No. 745 is herein referred to as "Union." Associated Wholesale Grocery of Dallas, Inc. is herein referred to as "Associated."

ployees of this store)" stating that Associated's employees were on strike and requesting the public "not to buy merchandise which this store obtains from Associated."[4] The picket banner later used (and which employees and union seek to continue to use) contained some variation from the original sign, viz.:

"Notice to Public and Store Owners Only
Not Directed to Suppliers or Employees
of This Store
Notice of
ASSOCIATED WHOLESALE
GROCERY OF DALLAS, INC. ON STRIKE
Protesting Discharge of Union Members
and for a Union Contract

---

[4]Union also distributed handbills which truthfully stated:

WAREHOUSE
EMPLOYEES AND HELPERS
ON STRIKE

Employees of Associated Wholesale Grocery of Dallas, Inc. have been on strike since August 27. They are striking because the Company refuses to pay decent wages and because the Company fired approximately forty-six men who joined in lawful union action.

THESE WORKING MEN APPEAL TO YOUR SENSE OF JUSTICE AND FAIR PLAY, AND ASK YOU TO SUPPORT THEIR STRIKE.

You be the judge! Here are the facts:

Every grocery warehouse in Dallas under contract with our local union pays substantially higher wages than those at AG. There are about 500 warehouse employees and drivers working under these Union Agreements, and their wages, for similar jobs, compare as follows with Associated Wholesale Grocery wages:

Job classification	*Average hourly union wages at A&P, Safeway, John Sexton, H. J. Heinz Co.*		*Average hourly wages at Associated Wholesale Grocery*
Fork truck operators	$1.715		$1.55
Receiving clerks	1.776		1.54
Checkers	1.768		1.45
Warehousemen (labor)	1.55		1.20
Trailer drivers	1.668		1.45
Bobtail drivers	1.668		1.35
Average of above four companies	1.691	Aver. of AG	1.423

AVERAGE DIFFERENCE IN WAGES SHOWN ABOVE IS OVER 27c PER HOUR.

Please support our strike.

BUY UNION

Patronize A&P, Safeway, John Sexton and H. J. Heinz.

Local 745 Dallas General
Drivers, Warehousemen, & Helpers."

The Board's trial examiner enjoined such distribution. The Board reversed as to the handbill distribution (one member dissenting). R. 76, ftnt. 10.

This store is a member stockholder of Associated Wholesale Grocery of Dallas, Inc. from which it obtains Substantial Quantities of Groceries including all Groceries with the *SHURFINE* label.

Please do not buy groceries obtained from Associated Wholesale Grocery of Dallas, Inc. If in doubt as to which groceries are from AWG, please ask the Store Manager.

DALLAS GENERAL DRIVERS & WAREHOUSEMEN LOCAL UNION NO. 745 — AFL-CIO

We are Not Striking This Store."[5]

Picketing was entirely peaceful; pickets were located on the public walk immediately adjacent to consumer entrances to the "member" stores. These public entrances were also used by store employees and employees of some suppliers, though each of the picketed stores had "delivery" entrances which were not picketed, and through which store employees and suppliers had unimpeded access to the stores.

Many consumers observing the picket signs, refused to enter the retail stores (R. 31); no employees refused to do so. No employees of either the retail stores or any supplier of the stores (other than Associated) were induced to strike or other concert of action (R. 74). Union was at pains to advise the representative of the Butchers' Union which represented the retail store employees "that the picket signs were not directed at any employee working in the stores not directed at any trucks making deliveries • • •

[5]The reference to discharges of union members in the second picket sign was to discharges for having engaged in strike activity. See 119 NLRB 41, enf. den.—F. 2d—, (CA 5, 1958).

if those men should come out of there when we put pickets on there, it would defeat our purpose because that was not the purpose of the picket line." B. A. 48.

1.

On the above facts the NLRB, one member dissenting[6], held that since the picketed consumer entrances to the retail stores were also "normally used by store employees and employees of some suppliers of the stores, this required the employees to cross the picket line in order to go to work or make deliveries" (R. 73). The Board thereupon held that such picketing "necessarily invites employees to make common cause with the strikers, and this is so irrespective of the literal appeal of the legends on the picket signs." (R. 74.)

Noting, but holding of no significance, "the fact that the picketing was not successful in inducing a work stoppage or a refusal to perform services" (R. 74), the NLRB holds the picketing constitutes "inducement of *employees* within the proscription of Section 8(b)(4)(A)." While further noting that the picketing also served the legitimate "purpose of appealing to members of the public" the Board insists that this legitimate purpose "cannot minimize the impact that the picketing normally has on employees and which conduct the Act has clearly designed to reach." (R. 75.)

The Court of Appeals agreed, holding (Op., p. 10) that "the normal purpose of a picket line is to persuade em-

[6]The fifth member of the Board did not participate in the Decision.

ployees not to cross it. If the intended effect of the picketing is a prohibited one, the lack of success in coercing the neutral employees is immaterial."

Thus both the Board and the Court below have held that the purest consumer picketing is *per se* interdicted by Section 8(b)(4)(A) since there is, in effect, an irrebuttable presumption that *any* picketing at retail locations is designed to induce retail employees to concerted action. And this is held to be true without regard to:

(1) The legend on the picket sign;

(2) The timing of the picketing;

(3) The place of the picketing;

(4) The fact that no employees were induced to concert of action; and

(5) The fact that this picketing was conducted at the only place at which consumers could be reached.

As the dissenting Opinion before the Board makes clear, 118 NLRB at 1259-1261:

> "If this evidence is insufficient to refute allegations in the complaint that the Respondent Union induced employees of neutral employers to engage in a strike, then I cannot see how any union can ever engage in customer picketing. Contrary to the majority, no decision of this Board or of any court stands for the extreme proposition implicit in the majority's decision that any picket line, wherever located, regardless of the message communicated by the pickets, and regardless of all attempts by the picketing union to limit its picketing to consumers as distinguished

from employees 'necessarily invites employees to make common cause with strikers' and 'constitutes inducement of employees within the meaning of Section 8 (b) (4) (A).' * * *

"There is, I believe, a limit to the inferences that can reasonably be drawn from the fact of picketing with regard to the intent of the picketing union and the effect of its picket line upon employees. The Second Circuit drew that line in the Arnold Bakers case, rejecting the Board's inference that the picketing was intended to induce a strike. I draw the line in the instant case because it seems clear to me that the picket line in this case and the surrounding circumstances conclusively rebut such an inference. * * *

"I believe the majority's decision in the instant case goes far beyond the Board's decision in the above cases in which I participated, but which were deemed unwarranted by the courts. Nothing in Section 8(b)(4)(A) or its legislative history supports the conclusion that a union cannot appeal to customers of a struck employer for help in a labor dispute. That section of the Act was intended by Congress to eliminate strikes against neutral employers not involved in the controversy between a union and another employer. It was not intended to protect a primary employer from the results of a union's attempt to enlist public support for its cause. The facts in this case establish that the Union in good faith appealed only to persons, who were not employees, to refuse to buy the products of Associated. I cannot agree that such conduct is violative of Section 8(b)(4)(A)."

The Court of Appeals for the Fifth Circuit enforced the Board's order, basing its decision on its conclusion that "the normal purpose of a picket line is to persuade *employees* not to cross it" (Opinion, p. 10, emphasis added). The Court also recited the facts that the color and composition

of the words "unfair" and "strike" on the picket sign were significant in evoking loyalties and responses from those observing the picket signs (Opinion, p. 10). How such composition of the picket sign transforms an appeal for *consumer* support to an appeal to secondary *employees* to engage in concerted refusals in the course of their employment is not explicated. Note, moreover, that the Board's finding was based upon the fact of the picketing "irrespective of the literal appeal of the legends on the picket signs" (R. 74).

It thus appears that the Board majority and the Court of Appeals have banned *consumer* picketing, though the statute proscribes only such picketing as has an object to induce or encourage "*employees* * * * *in the course of their employment* * * * to engage in a strike or concerted refusal * * *" (emphasis added).

2.

The Board and the Court of Appeals further erred in aplying Section 8(b)(4)(A) to picketing of members of a cooperative.

The statute only bans picketing designed to require an employer "to cease dealing in the products of any *other* producer * * * or to cease doing business with any *other* person."

Associated is a wholesale cooperative owned and controlled by the picketed retail grocers. Sales are made only to members at actual cost plus operating expenses; all net earnings are distributed to member stores as patronage

dividends. (B. A. 94-106.) Thus, the retail grocers in dealing with Associated deal with themselves. Associated's General Manager himself advised the member stores of the instant strike by letter advising each "Dear Member" of the fact "that a strike was called at *your* warehouse this morning," and culminating in an appeal as to "how you, as members, can help *your* warehouse pull through this crisis." (Emphasis added.) In his final paragraph, after urging the members to either themselves act as strike-breakers or send a man to volunteer services in loading and driving Associated trucks, he emphasizes that "we do not believe that our 370 members would be willing to stand still and see *their* warehouse suffer." B. A. 73-75 (Emphasis added).

Associated's general manager thus takes the realistic view that the instant labor dispute involves the retail grocers' warehouse—not some independent entity. The retail grocers, as the sole stockholders, the beneficiaries of patronage dividends, not only control Associated, they are the only persons who ultimately profit or lose from the wage levels and labor costs in effect in "their" warehouse. It is they who name management and make policy for Associated. As Associated's public advertisements (Resp. Ex. 3), which the picketing was designed to counter proclaim: the retail grocers owning and controlling Associated do business with themselves—thus can distribute more economically—and at a saving to the consumer (Union App. 71-79, Ex. 3). Along with the benefits of cooperative owner-

ship and control come the responsibilities of those who possess effective control, and when they set labor policies which perpetuate substandard wages they are subject to protest by picketing on the part of employees adversely affected by such labor policies and substandard conditions.

Associated on these undisputed facts, is not an *other* employer within the statutory provision. Nor are the retail member stores "*independent neutrals* within the purview of the secondary boycott provisions of the Act" as held by the Court of Appeals at page 8 of its Opinion. The picketing was not of "secondary", "independent", "neutral", or "other" employers. Rather it was of the very member stores which established and profited from the low wages and adverse working conditions of which the strikers complained. The picketing was thus primary and privileged. By precise statutory definition it can be secondary only when for the purpose of causing cessation of business relations with some *other* employer.

Reasons for Granting the Writ

A.

Conflict

The instant decision is in direct conflict with the decisions of the Second Circuit in *NLRB v. Local 50, Bakery etc. Union (Arnold Bakers), 245 F. 2d 542 (C. A. 2, 1957)* and *NLRB v. Business Machine etc. Mechanics (Royal*

Typewriter), 228 F. 2d 553 (C. A. 2, 1955), cert. denied, 351 U. S. 962:

In the former, *245 F. 2d 542 at 548*, the Court of Appeals stated:

> "The Board stated that 'the mere existence of a picket line is in most instances a "strike signal" * * *.' * * * It therefore seems to have concluded that it could dispense with any evidence to support an inference of 'inevitable' or 'natural and probable' inducement, and seemed to hold that absent rebuttal evidence, the mere fact of picketing is sufficient to raise a presumption of inducement, which supports a finding of intent to induce a work stoppage. * * *
>
> "* * * we do not agree that the fact of picketing alone, absent supporting evidence of the surrounding circumstances, should raise any presumption as to the intent or probable consequence of the picketing. In every case * * * there must be some independent evidence supporting the inference of inducement, in addition to the fact of picketing. * * * It cannot be assumed that a picket line will prevent even unionized employees from crossing it when the union apparently intends that they shall cross and takes steps to make its intent plain."

In the latter, *228 F. 2d 553 at 559, 560:*

> "It cannot be assumed that a picket line will prevent even unionized employees from crossing it when the union apparently intends that they shall cross and takes steps to make its intent plain. * * * If on this evidence we were to grant the Board's petition with respect to the customer picketing, we would, as a practical matter, come very close to condemning all customer picketing. Clearly this is not the purpose of the Act."

The Ninth Circuit has also noted *(Capital Service v. National Labor Relations Board, 204 F. 2d 848 at 854 (C. A. 9, 1953)*[7]:

> "* * * Such union encouragement of Service's drivers to make a 'concerted refusal in the course of their employment' respecting the handling of its products is entirely different in character from persuading the individual public buyers entering the stores to boycott such goods * * *."

The opinion of the Fifth Circuit in the instant case decided by Judges Tuttle, Jones and Brown is in conflict with an earlier decision in the same circuit where another panel (Judges Rives, Dawkins and DeVane), had in *NLRB v. General Drivers, 225 F. 2d 205 at 209 (C. A. 5, 1955)* refused to permit the Board to "substitute Board inferences as to the lawfulness or unlawfulness of an objective, based purely on its own judgment as to the propriety and adequacy of the means employed in a labor dispute, for the sole statutory test of unlawfulness of the end or objective sought, contrary to the Supreme Court's pronouncements that it is 'the objective of the union's secondary activities * * * and not the quality of the means employed to accomplish that objective, which was the dominant factor motivating Congress in enacting that provision (citing cases)'." *225 F. 2d 205, at 209-210, certiorari denied 351 U. S. 914.*

Finally, the instant decision cannot be reconciled with the rationale which this court recently spelled out in *Local*

[7]Affirmed 347 U.S. 501.

1976 United Brotherhood etc. v. NLRB, 375 U. S. 93 at 98-99, viz:

"Whatever may have been said in Congress preceding the passage of the Taft-Hartley Act concerning the evil of all forms of 'secondary boycotts' and the desirability of outlawing them, it is clear that no such sweeping prohibition was in fact enacted in Sec. 8(b)(4)(A). The section does not speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives. It forbids a union to induce employees to strike against or refuse to handle goods for their employer when an object is to force him or another person to cease doing business with some third party. Employees must be induced; they must be induced to engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with a third person. Thus, much that might argumentatively be found to fall within the broad and somewhat vague concept of secondary boycott is not in terms prohibited. * * * a union is free to approach an employer to persuade him to engage in a boycott, so long as it refrains from the specifically prohibited means of coercion through inducement of employees.

"From these considerations of what is not prohibited by the statute, the true scope and limits of the legislative purpose emerge. The primary employer, with whom the union is principally at odds, has no absolute assurance that he will be free from the consequences of a secondary boycott. Nor have other employers or persons who deal with either the primary employer or the secondary employer and who may be injuriously affected by the restrictions on commerce that flow from secondary boycotts. Nor has the general public * * *."

B.

Importance

The right of a union man to induce consumer boycott is at the very core of trade-unionism. Its denial must so upset the collective bargaining balance as to have repercussions throughout the economy. The right to picket for consumer support is clear at common law, protected by section 7 of the Act, and accorded constitutional protection.

1.

"The *typical* appeal by workers for public support in a labor dispute is the request that the *public* cease patronizing the employer," 4 Restatement of the Law of Torts 144, comment on Clause (a) of Section 799. (Emphasis added). Such appeal is lawful at common law, Restatement of the Law of Torts, Section 799.[8]

2.

The right to picket to enlist consumer support is not only a traditional means of communication, lawful at common law, it is likewise a "concerted activity" protected by Section 7 of the Act which guarantees "the right to * * * assist labor organizations * * * and to engage in * * * concerted activities for the purpose of * * * mutual aid or protection. Cf. *United Mineworkers v. Arkansas Oak Flooring, 351*

[8]At least since *Goldfinger v. Feintuch*, 276 N.Y. 281, 11 N.E. 910, 116 ALR 477, it has been clear that a union "may follow the non-union goods and seek by peaceful picketing to persuade the consuming public to refrain from purchasing the non-union product, whether that is at the plant of the manufacturer or at the store of the retailer * * *" Cf. Hellerstein, *Secondary Boycotts in Labor Disputes* (1938), 47 Yale L. J. 341.

U. S. 67, 76 S. Ct. at 567; NLRB v. Peter C. K. Swiss Chocolate Company, 130 F. 2d 503, 505-6 (C. A. 2), and see "Rights of Collective Action by Employees" as declared in Section 7 of National Labor Relations Act, 6 ALR 2d 416.

3.

The right to picket peacefully in support of consumer boycott has been recognized by this court as having constitutional protection. *Pastry Drivers, etc. v. Wohl, 315 U .S. 769, 62 S. Ct. 816 (1942). A. F. L. v. Swing, 312 U. S. 321, 61 S. Ct. 568 (1940); Cafeteria Employees v. Angelos, 320 U. S. 293, 64 S. Ct. 126 (1943).* Compare *Chauffeurs, etc. v. Newell d/b/a El Dorado Dairy, 356 U. S. 341, 78 S. Ct. 779 (1958).*[9]

4.

We have demonstrated that the right which has been denied by NLRB and the Court below in the instant case is one recognized at common law, protected by section 7 of the Act, and by constitutional guarantees of free speech. The denial of this right has resulted not only in the conflicts in the circuits specified above (*supra*, pp. 13-16), it has

[9]We understand, of course, that this court in *IBEW v. NLRB*, 341 U S. 701 has held Section 8(b)(4) of the Act constitutional; we do not question the constitutionality of the statute on its face. The statutory scheme prohibits specified secondary activity for specified unlawful objective, but the statute also provides procedures to determine the violation upon substantial evidence on the record considered as a whole, 29 U.S.C.A. Sec. 160(e).

We respectfully insist that the Board may not constitutionally prohibit this peaceful picketing in the absence of substantial evidence that it is an integral part of an unlawful purpose. It may not be prohibited on the plea that it may be conducted elsewhere, or solely because the picketing had incidental effects which were not a part of the discernably lawful appeal which it made. See *Thornhill v. Alabama*, 310 U.S. 88 and other free speech cases cited, *supra*.

brought confusion and uncertaintly in numerous other cases. Compare, for example, the District Court's decision in the *Louisville Cap* case, *Getreau v. United Hatters, etc. Union, F. Supp. , 33 CCH Labor Cases, Par. 71140 (D. C. W. D. Ky., 1957)*, with the Board's later disposition of the same case at *121 NLRB No. 148.* See also the District Court's decision in *Elliott v. Amalgamated Meat Cutters (W. D. Tex. 1959)*, and the contempt proceeding presently pending decision in that District Court where NLRB seeks contempt sanction against a Butchers union agent for pamphleteering with appeal for consumer boycott. W. D. Tex., El Paso Division, Civil #1993, not yet reported. Compare the District Court's decision in the *Rains* case, *F. Supp. (N. D. Ala., 1959), affirmed F. 2d , 44 LRRM 2040 (C. A. 5, April, 1959).*

We collect in the margin a number of recent cases before the Board and the lower federal courts in which the Board has applied, or sought to apply, the rule of the instant case that picketing necessarily invites employees to make common cause with the strikers, irrespective of the literal appeal or the circumstances of the picketing.[10]

[10] *Brewery Drivers, AFL* (Washington Coca-Cola Bottling Works, Inc.), 107 NLRB 299 (1953), enforced, 220 F. 2d 380 (D.C. Cir. 1955); *Intl. Brotherhood of Teamsters, AFL-CIO* (Ready Mixed Concrete Co.), 116 NLRB 461 (1956); *Local 386, Teamsters Union* (California Ass'n of Employers), 120 NLRB No. 161 (1958);

Laundry Drivers, AFL-CIO (Southern Service Co.), 118 NLRB 1435 (1957) enforced, 262 F. 2d 617 (CA 9, 1958); *Alpert v. Steelworkers*, 141 F. Supp. 447 (D.C. Mass, 1956); *In re United Steelworkers of America*, (Barry Controls, Inc.), 116 NLRB No. 207, enf'd. 250 F. 2d 184, 188 (CA 1, 1957); *NLRB v. Associated Musicians, AFL*, 226 F. 2d 900 (CA 2, 1956), cert. den., 351 U.S. 962 (1956);

Truck Drivers etc. v. NLRB, 249 F. 2d 512, cert. den. 355 U.S. 958 (CA D.C. 1957); *General Truck Drivers, etc. v. NLRB*, 252 F. 2d 619, (CA D.C. 1958); *General Drivers Local 984* (The Carradine Co.), 116 NLRB No. 227;

(Continued on page 20)

These reported cases, without regard to the multitudinous picketing situations "informally" disposed of by NLRB, indicate the number and importance of instances in which the issue here repeatedly arises in steel, oil, manufactur-

(Footnote 10, continued from page 19)

Local 618, Automotive Employees Union (Incorporated Oil Co.), 116 NLRB 1844 (1956), enforcement denied, 249 F. 2d 332 (CA 8, 1958); *Douds v. Bakery Workers Union*, 224 F. 2d 49 (CA 2 1954); *NLRB v. Service Trades, etc. Local 145*, 191 F. 2d 65 at 68, (CA 2, 1951); *Seafarers' Union*, (Superior Derrick Corp.), 122 NLRB No. 6 (1958); *Le-Bus v. General Truck Drivers Union*, 141 F. Supp. 673 (E.D.La., 1956); *Douds v. Intl. Brhd. of Teamsters, AFL*, 134 F. Supp. 702, 715-16 (S.D. N.Y. 1956);

In re Seafarers Union (Salt Dome Production Co.), 119 NLRB 1638, enforcement denied sub nom. *Seafarers v. NLRB*, F. 2d , 43 LRRM 2465 (CA D.C. 1959); *In re Barbers Union* (Chicago etc. Hairdressers Assoc.), 120 NLRB No. 122; *In re Knit Goods Workers Union, Local 155, ILGWU, AFL-CIO* (James Knitting Mills), 117 NLRB 1468; *In re Machinists Lodge 24* (Industrial Chrome Plating Co.), 121 NLRB 170 (1958); *Becker v. Gardeners Local Union 399*, F. Supp. (D. C. S. Cal. 1957), 40 L.R.R.M. 2056, later decision in same case by split NLRB: *In re Gardner's etc. Local 399*, 119 NLRB 962; *Becker v. Bakery Workers*, F. Supp. (D.C.S. Cal. 1957), 41 LRRM 2550; *Sperry v. Local 366 Brewery Workers*, F. Supp. 41 LRRM 2007 (D.C. Col. 1957); *Madden v. Barbers & Hairdressers* (D.C.S. Ind. 1957), F. Supp. , 40 LRRM 2676; *In re Brewery Workers Local 366* (Adolph Coors Co.), 121 NLRB No. 35 (1958); *Warehouse etc. Local 688* (Coca-Cola Bottling of St. Louis), 115 NLRB 1506 (1956); *In re Casket Makers' Union* (National Casket Co.), 114 NLRB 1329 at 1335 (1955); *Elliott v. Meat Cutters*, 91 F. Supp. 690 (W.D. Mo. 1950); *Newspaper and Mail Deliverers* (Interborough News Co.), 90 NLRB 2135 (1950); *Douds v. Confectionery Workers* (D.C.S.N.Y. 1949), 85 F. Supp. 191; *Capital Service, Inc., d/b/a Danish Maid Bakery v. NLRB*, 204 F. 2d 848, 853 (CA 9, 1953); *Retail Fruit etc. Clerks v. NLRB*, 249 F. 2d 591 (CA 9, 1957), enforcing 116 NLRB 856.

As Judge Wyzanski noted in *Alpert v. Steel Workers, Supra*, 141 F. Supp. at 452:

"Numerous cases before the Board show that the Board itself has had a wavering attitude not unlike that which most courts have with respect to most doctrines. There has been some development from a rather broad permission to permit picketing at places of business other than the primary employer's to narrower views more characteristic of a later administration * * *."

The NLRB General Counsel in an address of December 17, 1957, to the Association of the Bar of the City of New York, noted this issue as probably the most controversial and difficult aspect in the application of Section 8(b)(4) of the statute and stated:

"Where employees refuse to cross a picket line, or there is independent evidence that the union intended the picketing to achieve this result, it is easy to conclude that the picketing induced the type of action prohibited by Section 8(b)(4). But a picket line may have other purposes, such as appealing to consumers not to buy the products of the picketed firm. Where there is no evidence that employees have refused to cross the picket line, and no other evidence of an intent to induce work stoppages, can it nevertheless be inferred from the mere act of picketing that an appeal was made to employees to stop work for the picketed firm?"

ing, entertainment, retail and other industries, and involves unions of butchers, steelworkers, oilworkers, teamsters, machinists, office workers and others.

The NLRB's own records disclose that during the period from July, 1953 through January, 1956, the General Counsel authorized approximately 80 complaints in cases involving alleged violations of Section 8(b)(4)(A) by reason of picketing at the premises of a primary employer's customers. During the same period the Board issued approximately 30 orders in such cases.

Certiorari has been denied in cases arising in the Second, Fifth and District of Columbia Circuits,[11] leaving in effect Circuit Court opinions on both sides of the issue here presented. This state of the law results in the situation in which the Retail Store union, AFL-CIO found itself within the last month as disclosed by *Retail Store Union v. Rains*, *F. 2d* , *44 LRRM 2040 (C. A. 5, April 30, 1959)*. There Judge Hutcheson wrote that the Supreme Court's "kind of discursive disquisition* * * in regard to the secondary boycott provision[12] * * * was not determinative

[11]Holding that picketing does not *per se* constitute proscribed employee inducement: *NLRB v. Local 50, Bakery Etc. Union* (Arnold Bakers), 245 F. 2d 542 (CA 2, 1957); *NLRB v. Business Machine etc. Mechanics* (Royal Typewriter), 228 F. 2d 553 (CA 2, 1955), cert. den. 351 U. S. 962; *Local 618, Automotive Petroleum etc. Union v. NLRB*, 249 F. 2d 332 (CA 8, 1957); *NLRB v. General Drivers, AFL* (Otis Massey), 225 F. 2d 205 (CA 5, 1955), cert. den. 350 U. S. 914; *Sales Drivers Union v. NLRB* (Campbell Coal Co.), 229 F. 2d 514 (CA D. C. 1955), cert. den. 351 U. S. 972.

Contra: *Truck Drivers Union v. NLRB*, 249 F. 2d 512 (CA D. C. 1957), cert. den. 355 U. S. 958; *NLRB v. Laundry etc. Local No. 928*, 262 F. 2d 617 (CA 9, 1958); *Retail etc. Clerks v. NLRB*, 249 F. 2d 591 (CA 9, 1957).

[12]Judge Hutcheson's reference at F. 2d , 44 LRRM 2040 at 2042, is to *Carpenters' Union v. NLRB*, 357 U. S. 94 (1958), extracts from which are set out at p. 16 *supra*.

as to whether "this (the Fifth Circuit) court will go with the decisions of the Second Circuit * * *" or with "the decisions of this court (citing cases which) seem to look the other way."

We respectfully suggest that grant of certiorari herein will not only serve as a guide to the Fifth Circuit as to which line of authority it is to "go with", but that it will serve to settle important issues having extreme consequence for other litigants in oft-recurring similar situations.

CONCLUSION

For the foregoing reasons it is respectfully requested that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

L. N. D. WELLS, JR.,
1610 National Bankers Life Bldg.,
Dallas 1, Texas.

DAVID PREVIANT,
511 Warner Theatre Bldg.,
Milwaukee 3, Wisconsin.

HERBERT THATCHER,
Tower Building,
Washington, D. C.,
Counsel for Petitioners.

MULLINAX WELLS & MORRIS,
GOLDBERG, PREVIANT & COOPER,
Of Counsel.

June 2, 1959.

CERTIFICATE OF SERVICE

I, L. N. D. Wells, Jr., one of the attorneys for petitioners herein, and a member of the Bar of the Supreme Court of the United States hereby certify that copies of the foregoing Petition for Certiorari and Appendices were this day served on adverse parties herein in accordance with Supreme Court Rules 21(1) and 33 by depositing the same in the U. S. Post Office at Dallas, Texas, with first class air mail postage prepaid addressed to counsel of record at his post office address, as follows:

The Solicitor General of the United States
Department of Justice
Washington 25, D. C., and

Jerome D. Fenton, General Counsel

Thomas J. McDermott, Assoc. General Counsel

Marcel Mallet-Prevost, Assistant General Counsel

Attorneys for National Labor Relations Board
Washington 25, D.C.

L. N. D. WELLS, JR.

APPENDIX "A"

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17172

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

DALLAS GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL No. 745, AFL-CIO,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(March 12, 1959.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: Associated Wholesale Grocery of Dallas, Inc., is a corporation under the laws of Texas. It is engaged in the wholesale grocery business and has its office and warehouse in Dallas. Its stock is owned by approximately 370 retail grocers of whom about two-thirds are in Dallas and the others are at North Texas points. Each stockholder has but one vote irrespective of

the number of shares owned. There are nine directors, elected annually, who manage the affairs of the corporation. Although Associated sells only to its stockholders, they buy only about thirty-one per cent. of their requirements from Associated. The profits of Associated are distributed to the stockholders in the ratio of their purchases. A printing plant is operated by Associated and handbills are supplied to the stockholders who desire to purchase them. Earnings from this enterprise are distributed in the same manner as profits on merchandise transactions. Once a year Associated attempts to promote, through joint advertising campaigns of stockholding stores, the sale of goods bearing Associated's "Shurfine" label.

The respondent Union is the certified collective bargaining agent of the truckdrivers and warehousemen employed by Associated. After negotiations regarding wages and working conditions had failed to produce a result satisfactory to the Union, a strike was called on Monday, August 26, 1956. A picket line was placed at Associated's warehouse in an industrial part of Dallas. On the day the strike began the general manager of Associated sent to its stockholders a letter advising that incoming shipments and outgoing deliveries were, for the time being, being delayed and curtailed. Assistance by the stores to Associated's new employees was requested. In the letter Associated made a request[1] of its members to come or send someone to help load

[1] "We would like for as many of our members as possible to come to the warehouse Wednesday morning at 7:30 A. M. for the purpose of helping us load our trucks, and, if any of you are truck drivers and have a license either for bob-tail or trailer, we would appreciate it if you would volunteer your services until such time as we can get a permanent staff of employees to do the job. If you cannot come yourself, you may be able to send us a man to represent your store."

or drive trucks. In response to this request ten stores supplied help to Associated. One store furnished three men, one furnished two men, and each of the others furnished one man. No men from any of the stores worked at the Associated warehouse after the first week of the strike.

The Union distributed handbills at the entrances of the retail stores and in automobiles parked nearby. These handbills stated the Union's grievances against Associated and requested the public to buy elsewhere. On October 10, 1956, the Union carried an advertisement in a Dallas newspaper requesting public support of the strike.

On October 26, 1956, the Union commenced picketing at the entrances of some of the retail stores. From October 26 to November 17, 1956, eight stores were picketed. The employees carried placards reading as follows:

NOTICE TO THE PUBLIC ONLY

(not directed to employees of this store)

EMPLOYEES OF
ASSOCIATED WHOLESALE GROCERY
OF DALLAS INC.
ON STRIKE

THIS AG MEMBER
STORE IS UNFAIR

Please do not buy merchandise which this store obtains from Associated Wholesale Grocery of Dallas, Inc.

DALLAS GENERAL DRIVERS
WAREHOUSEMEN & HELPERS
LOCAL No. 745, AFL-CIO

On November 17, 1956, two other stores, and on November 19, 1956, one of them, were picketed. The pickets on these occasions carried signs which read as follows:

Notice to Public and Store Owners Only

Not Directed to Suppliers or Employees of This Store

Notice of

ASSOCIATED WHOLESALE
GROCERY OF DALLAS, INC. ON STRIKE

Protesting Discharge of Union Members
and for a Union Contract

This store is a member-stockholder of Associated Wholesale Grocery of Dallas, Inc. from which it obtains Substantial Quantities of Groceries including all Groceries with the Shurfine label. Please do not buy groceries obtained from Associated Wholesale Grocery of Dallas, Inc. If in doubt as to which groceries are from AWG please ask the Store Manager

DALLAS GENERAL DRIVERS AND
WAREHOUSEMEN LOCAL UNION
No. 745—AFL-CIO

We are not striking this store

In the first of these placards the words "ON STRIKE" and "UNFAIR" were much larger than any of the other lettering. The words "not directed to employees of this store" were smaller than any of the others. The words

"NOTICE TO THE PUBLIC ONLY", "ON STRIKE", and "UNFAIR" were printed in red. The rest of the sign was in black. In the second sign the words "ON STRIKE" dwarfed the other wording and were about four times as large as the letters of the statement "We are not striking this store." The words "ON STRIKE" were in red. Of the ten stores picketed, four were among those which had supplied men to Associated during the first week of the strike. Each of the stores which were picketed had a rear entrance through which deliveries of merchandise were made. No store was picketed where deliveries of goods to the store were made through the same entrance as that used by the patrons of the store.

A complaint was made before the National Labor Relations Board by its General Counsel charging the Union with unfair labor practices within the meaning of Section 8(b)(4)(A) of the National Labor Relations Act, 29 U.S.C.A. § 158 (b)(4)(A).[2] The Trial Examiner and the Board, with one member dissenting, found that the picketing was a violation of the specified section of the Act and entered a cease and desist order. 118 N.L.R.B. 1251. The Board has petitioned this Court for the enforcement of its order.

[2] "(b) It shall be an unfair labor practice for a labor organization or its agents —* * *

"(4) To engage in or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport; or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

"(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *"

The Union urges that the picketing was a concerted activity under Section 7 of the Act, 29 U.S.C.A. § 157,[3] and not a violation of Section 8(b)(4)(A). Section 7 does not sanction or authorize prohibited or illegal acts merely because they are done by persons acting in concert. *International Union v. Wisconsin Employment Relations Board*, 336 U.S. 245, 69 S. Ct. 516, 93 L. Ed. 651, reh. den. 336 U. S. 970, 69 S. Ct. 935, 93 L. Ed. 1121.

Resisting enforcement of the Order, the Union contends that as applied to the facts here present the Order is an unconstitutional impairment of the right of free speech as guaranteed by the First Amendment. It has been stated, and we think correctly, that, "The prohibition of inducement or encouragement of secondary pressure by §8(b)(4)(A) carries no unconstitutional abridgment of free speech." *International Brotherhood of Electrical Workers v. National Labor Relations Board*, 341 U. S. 694, 71 S. Ct. 954, 95 L. Ed. 1299. See also *Gibbons v. Empire Storage & Ice Co.*, 336 U. S. 490, 69 S. Ct. 684, 93 L. Ed. 834; *Truck Drivers and Helpers Local Union v. National Labor Relations Board*, D. C. Cir. 1957, 249 F. 2d 512, cert. den. 355 U. S. 958, 78 S. Ct. 543, 2 L. Ed. 2d 533. There is nothing to make the case here an exception to the general rule.

[3] "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of this title."

The Union contends that the relationship between the retail stores and Associated was such as to make inapplicable the provisions of Section 8(b)(4)(A) while the contrary was found by and is here asserted on behalf of the Board. Although the Union's position is supported by a most plausible argument, we think the Board's conclusion to the contrary is sound. The fact determinations and the inferences to be drawn from them are matters which the Congress has entrusted to the Board and its findings are to be sustained when they have support in the record. See, among other cases, *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111, 64 S. Ct. 851, 88 L. Ed. 1170, reh. den. 322 U. S. 769, 64 S. Ct. 1148, 88 L. Ed. 1595; *National Labor Relations Board v. Ferguson*, 5th 1958, 257 F. 2d 88; *National Labor Relations Board v. Truck Drivers & Helpers Local Union*, 5th Cir. 1956, 228 F. 2d 791; *National Labor Relations Board v. Coats & Clark, Inc.*, 5th Cir. 1956, 231 F. 2d 567. The Board's determination of the issue as to whether the retail stores were independent neutral employers entitled to the protection of Section 8(b)(4)(A) or were so allied with Associated as to be outside the operation of that section, may not be set aside if it has warrant in the record. *Retail Fruit and Vegetable Clerks Union v. National Labor Relations Board*, 9th Cir. 1957, 249 F. 2d 591.

The ten retail stores which were picketed by the Union were ten of the 370, more or less, stockholders of Associated whose business policies, including its labor rela-

tions, were fixed by its board of directors. While Associated was the supplier of a substantial part of the goods sold at the retail stores, it supplied, on an average, less than a third of the goods which the retailers purchased. There was not any common control nor, as among the retailers, any common ownership. Associated had a corporate entity separate from its stockholders which is not to be ignored. We think the record sustains the Board's conclusion that the retail stores were independent neutrals and within the purview of secondary boycott provisions of the Act: *J. G. Roy & Sons Co. v. National Labor Relations Board*, 1st Cir. 1958, 251 F. 2d 771; *Retail Fruit & Vegetable Clerks Union v. National Labor Relations Board, supra; National Labor Relations Board v. Wine, Liquor & Distillery Workers Union*, 2nd Cir. 1949, 178 F. 2d 584, 16 A.L.R. 2d 762. To be sure, four of the ten picketed stores had sent men to Associated's warehouse. As to these four retailers it might be urged that they were within the rule that one who knowingly does work which would otherwise be done by the striking employees of the struck employer is not within the protection of Section 8(b)(4)(A). *National Labor Relations Board v. Business Machine & Office Appliance Conference Board*, 2nd Cir. 1955, 228 F. 2d 553, cert. den. 351 U. S. 962, 76 S. Ct. 1025, 100 L. Ed. 1483; *Douds v. Metropolitan Federation*, D. C. S. D. N. Y. 1948, 75 F. Supp. 672. But this exception can hardly be held applicable where the practice was continued for only a brief interval, had ceased for a month before the picketing of the stores began, and there was no

indication that the practice would be resumed. We find no error in the rejection of the "alliance doctrine" for which the Union contended.

We are urged by the Union to hold that the Board's finding that the picketing was in violation of Section 8(b)(4)(A) is not supported by substantial evidence. The Union urges that the texts of the picket signs and the displaying of them only at the customer entrances of stores having separate delivery entrances shows an absence of any intent to induce employees of the picketed stores to strike or refuse to handle goods of Associated. On the contrary, says the Union, it appears that the picketing was an activity protected by Section 7 of the Act. The picketing of Associated's warehouse had not been successful in procuring an acceptance of the Union's demands. Efforts of the Union by handbills and newspaper advertising to dissuade consumers from purchasing merchandise procured by retailers from Associated had not produced the intended results. These ineffectual activities were followed by the picketing of the ten stores for the sole purpose, the Union here asserts, of discouraging the purchase by the public of the wares of Associated.

Picketing may induce action of one kind or another irrespective of the ideas which are being disseminated. *International Brotherhood v. Vogt, Inc.*, 354 U. S. 284, 77 S. Ct. 1166, 1 L. Ed. 2d 1347, reh. den. 354 U. S. 945, 77 S. Ct. 1423, 1 L. Ed. 2d 1558. "Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling

a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed words." *Hughes v. Superior Court*, 339 U. S. 460, 70 S. Ct. 718, 94 L. Ed. 985. Here the picketing of itself might have exerted influences and produced consequences different from newspaper advertising and distribution of circulars. That the signs carried by the pickets would tend to do so cannot well be doubted. The word "UNFAIR" upon one from of the signs and the word "STRIKE" on the other were so emphasized by size and color as to suggest to those attracted to the moving picket signs that the picketed store was unfair to labor and affected by the strike. The Board found, as did its Trial Examiner, that the Union sought to achieve its objective, in part at least, through the inducement and encouragement of neutral employees to refuse to handle merchandise or perform services for their employer. The normal purpose of a picket line is to persuade employees not to cross it. If the intended effect of the picketing be a prohibited one, the lack of success in coercing the neutral employees is immaterial. *National Labor Relations Board v. Associated Musicians*, 2nd Cir. 1955, 226 F. 2d 900, cert. den. 351 U. S. 962, 76 S. Ct. 1025, 100 L. Ed. 1483. Picketing of a neutral employee, however peaceful, is given no inherent exemption from the prohibition against secondary boycotts. *International Brotherhood of Electrical Workers v. National Labor Relations Board*, 341 U. S. 694, 71 S. Ct. 954, 95 L. Ed. 1299; *National Labor Relations Board v.*

Truck Drivers & Helpers, Etc., 5th Cir. 1956, 228 F. 2d 791. The record justifies the findings and inferences of the Board.

Thomas W. Jones, an employee of Associated, was among those who went out on strike. On the second day of the strike he was waiting to go on picket duty at Associated's warehouse. He told Neely, a Union steward, that he was thinking of going back to work. Neely attempted to talk him out of going back. Present in the group and overhearing the conversation between Jones and Neely were three other striking employees. One of these said he would be the first to "jump on" Jones if he went back to work and the others stated they would help, and told Jones that if they jumped on him they would beat him up so that he couldn't recognize who did it. Neely observed silence and did not repudiate the threats. Jones was out on the strike about three weeks and then returned to work. The Trial Examiner found that the Union was not responsible for the threats and that it was not incumbent on Neely to repudiate the threats of physical violence made by others. The Board, departing from the conclusions of the Examiner, held that the Union, through Neely's failure to repudiate the threats, was guilty of coercive conduct in violation of Section 8(b)(1)(A) of the Act,* and ordered that the Union cease and desist from threatening employees with violence if they abandon any strike called by the Union or in like manner

*"It shall be an unfair labor practice for a labor organization or its agents —

"(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 * * *". 29 U.S.C.A. § 158(b)(1)(A).

restraining or coercing employees in their rights guaranteed by Section 7 of the Act.

Neither the Union nor its members are responsible for the unlawful acts of a member or officer of the Union in the absence of authorization or ratification of the acts or participation therein. 29 U.S.C.A. § 106; *National Labor Relations Board v. Marshall Car Wheel & Foundry Co.*, 5th Cir. 1955, 218 F. 2d 409. The authority of a Union steward to acquiesce in and to adopt, on behalf of the Union, threats made by Union members who are not officers, will not be presumed. There was no proof of authorization or ratification and hence the Board's order in this respect cannot be sustained and will not be enforced.

As to that portion of the Board's order against threatening employees with violence, enforcement will be denied; and in other respects the petition of the Board for the enforcement of its order is

GRANTED.

APPENDIX "B"

DECISION AND ORDER

118 NLRB No. 165 D-553

Dallas, Texas

United States of America
Before The National Labor Relations Board

Dallas General Drivers, Warehousemen & Helpers, Local No. 745, AFL-CIO

and Case No. 16-CC-71

Associated Wholesale Grocery of Dallas, Inc.

On January 9, 1957, Trial Examiner Lloyd Buchanan issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices and recommended that the complaint be dismissed with respect to such allegations. Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.[1]

The Board has reviewed the ruling of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and

[1] As the record, exceptions, and briefs adequately present the issues and positions of the parties, the Respondent's request for oral argument is denied.

briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the exceptions, modifications, and additions noted below.

1. We agree with the Trial Examiner that, by picketing the retail stores named in the Intermediate Report at entrances and driveways used by store employees and employees of some suppliers of the stores, the Respondent, in violation of Section 8(b) (4) (A) of the Act, induced and encouraged employees of secondary employers concertedly to refuse in the course of their employment to handle goods or perform services for their employer with an object of forcing or requiring the store owners to cease doing business with Associated. However, we diasgree with the Trial Examiner that the Respondent's distribution of handbills in the vicinity of the stores was similarly violative of Section 8 (b) (4) (A).

As discussed in the Intermediate Report, the Respondent, which was engaged in a labor dispute with Associated over the terms of an agreement, called a strike and began picketing Associated's warehouse. To implement its strike, the Respondent originally distributed handbills at the retail stores of various customers of Associated and inserted an advertisement in a local newspaper appealing for public support of its strike. Apparently not satisfied with the effectiveness of this campaign, the Respondent resorted to picketing 10 retail stores of Associated's customers at different times. Such picketing continued until enjoined by a United States District Court under Section 10 (1) of the

Act. At eight of the stores, the pickets carried signs *ostensibly* advising the public that Associated's employees were on strike but also stating that the picketed store was unfair and not to buy merchandise obtained from Associated. At the other two stores there was little variation in the picket signs which were addressed both to the public and the store owners but added that they were not striking the store.

The Respondent contends, among other things, that its activities at the stores were simply intended as appeals to the consuming public and not as inducement and encouragement of employees within the meaning of Section 8 (b) (4) (A). On the contrary, it argues, the picketing was concerted action protected by Section 7 of the Act and the dissemination of information guaranteed by Section 8 (c) and the Constitution.

There can be no doubt that an object of the Respondent's picketing at the retail stores was to force a cessation of business dealings between the store owners and Associated.[2] This object is indicated, not only in the fact that the Respondent extended its picketing activities so as to involve neutral employers at their place of business, but also is implicit in the Respondent's admissions in its answer to the complaint that it thereby sought to enlist the support of the store owners. In addition, the picket signs themselves, the handbills, and the Respondent's earlier letter of August 31 to Associated's customers confirm the Respondent's

[2]It is settled law that Section 8 (b) (4) (A) requires only that an object of the Union's activities, and not the sole object, fall within its proscription. *N. L. R. B. v. Denver Building and Construction Trades Council*, 341 U. S. 689; *International Brotherhood of Electrical Workers, Local 501 v. N. L. R. B.*, 341 U.S. 694, 700.

purpose to put pressure on the store owners to suspend their dealings with Associated and thus to force Associated to accept the Respondent's demands.

Contrary to the Respondent's contention, we find, as did the Trial Examiner, that the Respondent sought to achieve its objective, in part at least, through the inducement and encouragement of employees of neutral employers to refuse to handle merchandise or perform services for their employer. As indicated above, the picketing covered entrances to stores of Associated's customers normally used by store employees and employees of some suppliers of the stores. This required the employees to cross the picket line in order to go to work or make deliveries. But, as the Ninth Circuit Court of Appeals observed:[3]

> The reluctance of workers to cross a picket line is notorious. To them the presence of the line implies a promise that if they respond by refusing to cross it, the workers making the appeal will in turn co-operate if need arises. The converse, likewise, is implicit. "Respect our picket line and we will respect yours." In this setting the picket line is truly a formidable weapon, and one must be naive who assumes that its effectiveness resides in its utility as a disseminator of information.

It is idle to suggest that the Respondent was not aware of this normal reaction of employees to picket lines.[4] Indeed, it appears that the Respondent resorted to this "formidable weapon" to enlist the support of employees only after its appeal to consumers through handbill distribution and

[3] *Printing Specialties and Paper Converters Union v. LeBaron*, 171 F. 2d 331, 334 (C. A. 9).

[4] See also *Local 618 (Incorporated Oil Company)*, 116 NLRB 1844, 1846; *Brewery and Beverage Drivers (Washington Coca-Cola Bottling Works, Inc.)*, 107 NLRB 299, 302 enf'd. 220 F. 2d 380 (C. A. D. C.).

newspaper advertising proved inadequate. The fact that the picketing was not successful in inducing a work stoppage or a refusal to perform services is not controlling.[5] The significance of such conduct is that it necessarily invites employees to make common cause with the strikers. And this is so irrespective of the literal appeal of the legends on the picket signs.[6] In these circumstances, "To exempt peaceful picketing from the reach of S. 8 (b) (4)," as the Supreme Court recognized, "would be to open the door to the customary means of enlisting the support of employees to bring economic pressure to bear on their employer."[7] The Supreme Court therefore agreed with the Board in that case that peaceful picketing for a proscribed objective was barred by Section 8 (b) (4) (A).[8]

In the present case, we too find that picketing the stores of secondary employers at entrances customarily used by store employees and employees of suppliers for the purpose

[5] *N. L. R. B. v. Associated Musicials (Gotham Broadcasting Corporation)*, 226 F. 2d 900 (C. A. 2), enf'g. 110 NLRB 2186, certiorari denied 351 U. S. 962.

[6] *Hughes v. Superior Court of California*, 339 U. S. 460, 464-465. Contrary to our dissenting colleague's opinion, it is not controlling whether or not the picketing actually induced or was intended to induce any employees to engage in a strike. It is sufficient, as the majority has held in Local 50, *Bakery and Confectionery Workers Union, AFL-CIO (Arnold Bakers, Inc.*, 115 NLRB 1333), that the necessary effect of such conduct is to induce employees to engage in a work stoppage. It appears to us that our dissenting colleague shared this view in the cited case. Although the Second Circuit came to a contrary conclusion in that case (*N.L.R.B. v. Local 50*, decided May 23, 1957, 40 LRRM 2107), we, like our colleague, respectfully disagree. Cf. *The Radio Officers Union of the Commercial Telegraphers Union, A.F.L. v. N.L.R.B.*, 347 U. S. 17. Nor do we agree with our colleague that the Board's decision in the *Arnold* case supports his view that picketing of entrances normally used by customers, as well as employees of the stores and employees of suppliers of the stores, is permissible. If, for no other reason, that case did not involve such a situation.

[7] *International Brotherhood of Electrical Workers v. N.L.R.B.*, 341 U. S. 694, 703.

[8] *International Brotherhood of Electrical Workers v. N.L.R.B., supra*; similarly, *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675.

of forcing the store owners to cease doing business with Associated, constitutes inducement of employees within the meaning of Section 8(b)(4)(A).[9] The fact that the picketing might, in part, additionally serve the purpose of appealing to members of the public, as the Respondent urges, cannot minimize the impact that the picketing normally has on employees and which conduct the Act was clearly designed to reach.

However, with respect to the handbills, we disagree with the Trial Examiner that their distribution in the vicinity of the stores also violated Section 8(b)(4)(A).[10] In our opinion, the distribution of handbills to the general public appealing for a consumer boycott, unlike picketing, does not necessarily invite or instigate a work stoppage or a refusal to perform services. As the Supreme Court observed:[11]

> Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word.

Accordingly, we find that the Respondent's distribution of the handbills did not violate Section 8(b)(4)(A) of the Act.

[9] *N.L.R.B. v. General Drivers (Otis Massey Co.)*, 225 F. 2d 205 (C.A. 5), certiorari denied 350 U. S. 914, and *Sales Drivers (Campbell Coal Co.) v. N.L.R.B.*, 229 F 2d 514 (C. A. D. C.), certiorari denied 351 U. S. 972, relied upon by the Respondent, are distinguishable from the present case. In *General Drivers*, the Union picketed a construction project where employees of the primary employer were working. In *Sales Drivers*, the Union picketed the primary employer's trucks at a construction project only when the trucks were making deliveries there. In the instant case, it is undisputed that the picketing occurred at the retail stores without reference to whether the employees of Associated, the primary employer, were present.

[10] For the reasons stated by the Trial Examiner, Member Rodgers would find the distribution of handbills violative of Section 8(b)(4)(A).

[11] *Hughes v. Superior Court of California*, 339 U. S. 460, 465.

The Respondent further contends that the retail stores and Associated are substantially one and the same entity and that therefore, under the *Ebasco* principle,[12] an object of the Respondent's activities was not to force any employer to cease doing business with "any other person" within the meaning of Section 8(b)(4)(A). In the *Ebasco* case, the Court held that an employer who performed struck work for another employer involved in a labor dispute was an "ally" of that employer and therefore was not doing business with that employer as to be entitled to protection of Section 8(b)(4)(A). However, the situation in the present case is entirely different. Except for a temporary alliance with respect to a few stores which furnished replacements to Associated during the first week of the strike,[13] the picketed stores did not perform any struck work for Associated. Moreover, as the Trial Examiner found, the retail stores are separate legal entities conducting a normal business relationship with Associated which exercises no control over the stores.[14] In these circumstances, we find that the stores are neutral employers which Section 8(b)(4)(A) was designed to protect from being involved in controversies not of their own. We, therefore, find no merit in the Respondent's contention.[15]

[12] *Douds v. Metropolitan Federation of Architects*, 75 F. Supp. 672.

[13] The record shows that, in response to Associated's appeal, 4 of the stores involved herein furnished several temporary replacements during the first week of the strike. However, such assistance terminated more than a month before store picketing began. Such a temporary alliance does not affect our findings herein or the necessity for the remedial order hereinafter prescribed

[14] Cf. *Indegro, Inc.*, 117 NLRB 54.

[15] To effectuate the policies of the Act, we shall provide, in accordance with the General Counsel's request, for the posting of notices at the retail stores named in the complaint, if permission is granted by their owners. See, for example, *Local 618 (Incorporated Oil Company)*, 116 NLRB 1844, 1850; *Brewery and Beverage Drivers (Washington Coca-Cola Bottling Works, Inc.)*, 107 NLRB 299, 306.

In view of all the facts and circumstances in this case, we accordingly find that, by picketing the premises of secondary employers, as indicated above, with an object of forcing these employers to cease doing business with Associated, the Respondent violated Section 8(b)(4)(A) of the Act.

2. The Trial Examiner found that the Respondent was not responsible for threats of violence made by certain strikers to Jones, another striker, who indicated that he was going to return to work, while these strikers were waiting for their turn to go on picket duty. He therefore recommended dismissal of the Section 8(b)(1)(A) allegations of the complaint. These threats were made in the presence of steward Neeley, who remained silent and who had previously tried to dissuade Jones from abandoning the strike.

We agree with the General Counsel's contention that where, as here, the threat was made in the presence of a union representative, which the steward was, and the threat was not repudiated by him, the Respondent is liable therefor.[16] Accordingly, we find that by reason of the foregoing conduct the Respondent violated Section 8(b)(1)(A) of the Act. To remedy this unfair labor practice we shall direct the Respondent to cease and desist from this and like and related conduct.

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[16] *District 50 (Tungsten Mining Corporation)*, 106 NLRB 903, 907-908; *United Electrical Workers*, 106 NLRB 1372.

ORDER

Upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Dallas General Drivers, Warehousemen & Helpers, Local No. 745, AFL-CIO, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Inducing or encouraging employees of any employer, other than Associated Wholesale Grocery of Dallas, Inc., to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of Associated Wholesale Grocery of Dallas, Inc., or to cease doing business with that company;

(b) Threatening employees with violence if they abandon any strike called by it, and in any like or related manner restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post at its offices and meeting halls in Dallas, Texas, copies of the notice attached hereto as an appendix.[17] Copies

[17] In the event this Order is enforced by a decree of a United States Court of Appeals, the notice shall be amended by substituting for the words "PURSUANT TO A DECISION AND ORDER," the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

of said notice, to be furnished by the Regional Director for the Sixteenth Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and be maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(b) Mail to the Regional Director for the Sixteenth Region signed copies of the notice attached hereto as an appendix for posting at the premises of the customers of Associated Wholesale Grocery of Dallas, Inc., named in the complaint in this proceeding, in places where notices to their employees are customarily posted, if the customers are willing to do so;

(c) Notify the Regional Director for the Sixteenth Region, in writing, within ten (10) days from the date of this Order as to what steps it has taken to comply herewith.

Dated, Washington, D. C. Aug. 29, 1957.

Boyd Leedom, Chairman

Philip Ray Rodgers, Member

Joseph Alton Jenkins, Member
NATIONAL LABOR
RELATIONS BOARD

(SEAL)

ABE MURDOCK, MEMBER, dissenting:

I disagree with the majority's decision in this case because I believe this union's picketing did not and was not intended to induce any employees to engage in a strike. In my opinion, the evidence in this case establishes conclusively that the union's only purpose in establishing a picket line before these grocery stores was to enlist the aid of *customers* in its dispute with Associated, a wholesale enterprise owned and operated for the benefit of the picketed stores.

Assuming, however, that this picketing, addressed to customers and employers, occurring only before customer entrances, induced some employees not to cross the picket line, I cannot agree that such picketing was unlawful secondary picketing within the meaning of Section 8(b)(4)(A). I reach this conclusion because I am not satisfied, as the majority is, that a relatively small number of retail store owners, who derive profit from and entirely control the policies of a joint purchasing and warehousing venture, are unconcerned neutral employers when the employees in their common warehouse are on strike. The record in this case shows that on August 27, 1956, the very day the strike began, Associated's warehouse manager sent a letter to the retail stores constituting its member stockholders in which he requested that they furnish sttrike replacements and stated that he did not believe "our 370 members would be willing to stand still and see their warehouse suffer." In response to this request 10 member stores furnished 13

temporary replacements to the warehouse during the first week of the strike. It would seem indisputable that this strike could have been settled overnight if a substantial number of grocery store owners in the exercise of their power as stockholders of Associated wanted it so. Rather than embark upon such a course, however, members of Associated gave support and encouragement to a labor relations policy that could only lead to a continuation of the strike. Now the General Counsel contends, and the majority finds, that these store owners are neutral, secondary employers who have no interest at all in the dispute involving employees at *their* warehouse. The majority reaches this conclusion upon the inapposite ground that Associated "exercises no control over the stores." These store owners, however, are involved in Associated's dispute with the Union not because of Associated's control over them, *but because they exercise absolute control over Associated and dictate its policies.* Associated is the wholly owned creature of its members. It is engaged in purchasing groceries in wholesale quantities for their mutual profit and convenience. Its warehousing function is an indispensable part of their business operations. To that extent, at least, the members are engaged in a common venture, for a successful strike at the warehouse would block virtually their entire source of supplies. Increased costs in purchasing and warehousing would directly affect their profits. It seems obvious to me that the grocery store-owners are immediately and vitally concerned in the labor policies followed by Associated, which resulted in a strike at the warehouse. Certainly, the manag-

ers of a wholesale grocery corporation, which exists solely to service its retail grocery stockholders and purchase goods for them at the lowest possible cost, are not free agents in the negotiation of labor contracts. What they grant in collective bargaining is granted with the tacit approval of those who stand to gain or lose in such a transaction. Under these circumstances, to find, as the majority does, that the grocery store owners, the only persons with actual power to settle the warehouse dispute, are "neutral employers" protected by Section 8(b)(4)(A) from involvement in "controversies not their own" is to proceed without regard to the realities in this situation.

As indicated above, I am, moreover, of the opinion that the Union did not intend to nor did it induce any employees to strike on the facts appearing in this record. I must conclude, therefore, that the complaint should be dismissed for this reason, even if the retail stores are to be found neutral employers. The facts as to the picketing are substantially undisputed and may be summarized as follows:

The Respondent Union is the certified bargaining representative of the employees of Associated, a cooperative purchasing organization which sells groceries only to its member retail grocery stores. On August 27, 1956, the Union struck Associated and began picketing its warehouse, which is located in an industrial area. Thereupon Associated wrote to its stockholders, requesting replacements for its striking employees until a permanent staff could be hired. As a result, 10 of its member stores, including 4 which were later picketed, furnished 13 temporary replacements for the first

week of the strike. On August 31, in answer to Associated's appeal, the Respondent wrote letters to the member stores, requesting them to urge Associated to make a reasonable settlement with the Union and, in the meantime, to buy their groceries elsewhere.

Picketing of 8 retail stores occurred at different times between October 26 and November 16. The pickets carried placards addressed to the "Public Only (not directed to employees of this store)," stating that Associated's employees were on strike, that this Associated "Member Store is Unfair," and requesting the public "not to buy merchandise which this store obtains from Associated." Two other stores were picketed after November 17 with some variation in the sign which was addressed to the "Public and Store Owners Only—Not Directed to Suppliers or Employees of This Store." After stating that Associated was striking for a contract and protesting the discharge of Union Members, and that the store was a member stockholder of Associated from which it obtained groceries, this sign urged the public not to buy groceries obtained from Associated and "If in doubt as to which groceries are from Associated please ask the Store Manager." The sign also added that "We are Not Striking This Store." It is this sign that the Union desires to use in the future, if permitted.

Significantly, the picketing occurred at *store entrances, but not at delivery entrances.* However, these public entrances were also used by store employees and employees of some suppliers. There is also evidence that at one of the stores pickets were stationed at a driveway to a *customer's*

parking lot, which also served as one of the places of access to the back door delivery entrances. No striker picketed the delivery entrance itself. Handbills were also circulated in the vicinity of the stores and were put in cars parked near the stores. There is no evidence that any store employee refused to work or that any employee of suppliers refused to make a delivery. Nor is there any evidence that any picket at any time suggested or indicated to any employee that the picket sign, despite its literal language, was intended to induce employees to refuse to work. Indeed, evidence offered by the Union and, in my opinion, improperly rejected by the Trial Examiner, would have established that the Union communicated with another labor organization representing employees in the picketed stores and informed the latter that the picket line was not directed to any union butchers who might be employed in any of the stores.

If this evidence is insufficient to refute allegations in the complaint that the Respondent Union induced employees of neutral employers to engage in a strike, then I cannot see how any union can ever engage in customer picketing. Contrary to the majority, no decision of this Board or of any court stands for the extreme proposition implicit in the majority's decision that *any picket line, wherever located, regardless of the message communicated by the pickets, and regardless of all attempts by the picketing union to limit its picketing to consumers as distinguished from employees* "necessarily invites employees to make common cause with the strikers" and "constitutes inducement of employees within the meaning of Section 8(b)(4)(A)." Such a con-

clusion was specifically rejected by a majority of the Board in the recent *Arnold Bakers* decision 115 NLRB 1333, 1340. There the union picketed a bakery plant with signs purporting to appeal only to the public. No customers, however, ever came to the bakery plant to buy bread and the shipping platform which was picketed was on a back street little traveled by the public. The decision of the majority in which I participated pointed out that "the *traditional* picket line *before employee entrances* has the effect of inducing employees to refuse to work for picketed employer." (emphasis added) This statement was made on the basis of decisions of the Supreme Court and of the Courts of Appeal, cited in the *Arnold Bakers* decision. But the majority was most careful to note that such cases did not include "consumer picketing of customer entrances to stores or plants." Now the majority in the instant case would extend the *Arnold Bakers* decision to a picket line before custsomer entrances, addressed to customers and employers, and carefully limited in other respects by the Union to influence only such individuals. The extremity of this decision is illustrated by the fact that the Court of Appeals for the Second Circuit reversed the majority decision in *Arnold Bakers* on the ground, in part, that the Board had erred in assuming "that a picket line will prevent even unionized employees from crossing it when the union apparently intends that they shall cross it and takes steps to make its intent plain. Such an assumption is even more doubtful when it appears . . . that the employees unanimously disregarded the pickets and went to work.", citing *N.L.R.B. v. Business Machine &*

Office Appliance Mechanics, 228 F. 2d at 560 (C.A. 2), *N.L.R.B. v. Local 50, Bakery and Confectionery Workers International Union, AFL-CIO*, F. 2d 40 LRRM 2107. While I am of the opinion, with due respect for the views of the Court of Appeals for the Second Circuit, that the Board's majority decision in *Arnold Bakers* is right, I am just as firmly of the opinion that the majority's decision in the instant case is wrong. There is, I believe, a limit to the inferences that can reasonably be drawn from the fact of picketing with regard to the intent of the picketing union and the effect of its picket line upon employees. The Second Circuit drew that line in the *Arnold Bakers* case, rejecting the Board's inference that the picketing was intended to induce a strike. I draw the line in the instant case because it seems clear to me that the picket line in this case and the surrounding circumstances conclusively rebut such an inference.

The Board has been warned not only by the Court of Appeals for the Second Circuit, but by the Court of Appeals for the Fifth and District of Columbia Circuits to proceed cautiously in the use of inferences under Section 8(b)(4). In *N.L.R.B.* v. *General Drivers (Otis Massey)* 225 F. 2d 205 (C.A. 5), cert. den. 350 U.S. 914, 76 S. Ct. 198, the court rejected the Board's conclusion that picketing at a construction project where employees of the primary and other neutral employers were working was violative of Section 8(b)(4)(A). In that case the Board proceeded on the theory that the primary employer had a permanent place of business,

harboring the situs of the dispute, and that the Union could not picket the premises of another employer without violating this Section of the Act. The court held that the Board's theory would not support an inference that the Union intended to induce employees of neutral employers to strike because "peaceful picketing upon common premises, directed solely against the primary employer with whom a labor dispute exists, is still lawful under the Act, and . . . any adverse effect upon secondary, neutral employers must necessarily be viewed as incidental to the lawful exercise of that statutory right." *N.L.R.B. v. General Drivers, supra*, at page 209. The court's decision has been cited with approval and relied upon by the Court of Appeals for the District of Columbia in *Sales Drivers (Campbell Coal Co.) v. N.L.R.B.*, 229 F. 2d 514, setting aside and remanding 110 NLRB 2192, cert. den. 351 U. S. 972.

I believe the majority's decision in the instant case goes far beyond the Board's decisions in the above cases in which I participated, but which were deemed unwarranted by the courts. Nothing in Section 8(b)(4)(A) or its legislative history supports the conclusion that a union cannot appeal to customers of a struck employer for help in a labor dispute. That Section of the Act was intended by Congress to eliminate *strikes* against neutral employers not involved in the controversy between a union and another employer. It was not intended to protect a primary employer from the results of a union's attempt to enlist public support for its cause. The facts in this case establish that the Union in good

faith appealed only to persons, who were not employees, to refuse to buy the products of Associated. I cannot agree that such conduct is violative of Section 8(b)(4)(A).

For these reasons, I dissent.

Dated, Washington, D. C., Aug. 29, 1957.

Abe Murdock, Member
NATIONAL LABOR
RELATIONS BOARD

APPENDIX "C"

(ORIGINAL FILED—APRIL 10, 1959)

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 17172

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

DALLAS GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL NO. 745, AFL-CIO,
Respondent.

DECREE ENFORCING, IN PART AND DENYING IN PART, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: Tuttle, Jones and Brown, Circuit Judges:

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated August 29, 1957. The Court heard argument of Respondent's Counsel on November 3, 1958, and on March 12, 1959, after having considered the transcript of record and briefs filed in this cause, handed down its decision enforcing in

part and denying in part the order of the Board. In conformity therewith, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Respondent, Dallas General Drivers, Warehousemen & Helpers, Local No. 745, AFL-CIO, its officers, representatives, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Inducing or encouraging employees of any employer, other than Associated Wholesale Grocery of Dallas, Inc., to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of Associated Wholesale Grocery of Dallas, Inc., or to cease doing business with that company;

2. Take the following affirmative action, which the Board has found will effectuate the policies of the National Labor Relations Act, as amended, hereinafter called the Act:

(a) Post at its offices and meeting halls in Dallas, Texas, copies of the notice attached hereto as an appendix. Copies of said notice to be furnished by the Regional Director for the Sixteenth Region of the National Labor Relations Board, Fort Worth, Texas, shall after being duly signed by

the Respondent's representative, be posted immediately upon receipt thereof, and be maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(b) Mail to the aforesaid Regional Director signed copies of the notice attached hereto as an appendix for posting at the premises of the customers of Associated Wholesale Grocery of Dallas, Inc., named in the complaint in this proceeding, in places where notices to their employees are customarily posted, if the customers are willing to do so;

(c) Notify the said Regional Director, in writing, within ten (10) days from the date of this Decree as to what steps it has taken to comply herewith.

ENTERED: APR 10 1959

APPENDIX

NOTICE TO MEMBERS AND ALL EMPLOYEES

PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER

of the National Labor Relations Board, and, in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our members and all employees that:

WE WILL NOT induce or encourage employees of any employer, other than ASSOCIATED WHOLESALE GROCERY OF DALLAS, INC., to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of ASSOCIATED WHOLESALE GROCERY OF DALLAS, INC., or to cease doing business with that company.

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL NO. 745, AFL-CIO

(Labor Organization)

By

(Representative) (Title)

Dated

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

United States Court of Appeals
FOR THE FIFTH CIRCUIT

I, EDWARD W. WADSWORTH, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing three (3) pages, numbered from -1- to -3-, inclusive, contain a true copy of the Decree enforcing, in part and denying in part and Order of the National Labor Relations Board, with Appendix attached,

in the case of

NATIONAL LABOR RELATIONS BOARD
Petitioner,

versus

DALLAS GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL NO. 745, AFL-CIO,
Respondent.

No. 17172

as the same remains upon the files and records of said United States Court of Appeals.

(Seal)

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said United States Court of Appeals, at the City of New Orleans, Louisiana, this 10th day of April, A. D. 1959

EDWARD W. WADSWORTH, Clerk
By /s/ Clara R. James

Chief Deputy Clerk, U. S. Court of Appeals for the Fifth Circuit.

APPENDIX "D"

FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

APPENDIX "E"

Excerpts from Labor Management Relations Act of 1947, 29 U.S.C., Section 151:

Section 7:

"Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of this title."

Section 8(b)(4):

"(b) It shall be an unfair labor practice for a labor organization or its agents — * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;"

Section 8(c):

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

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511785—59

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 973

DALLAS GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL NO. 745, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 25–36) is reported at 264 F. 2d 642. The decision of the National Labor Relations Board (R. 70–88)[1] is reported at 118 NLRB 1251.

JURISDICTION

The judgment of the Court of Appeals was entered on April 10, 1959 (Pet. 57–59). The petition for a writ of certiorari was filed on June 3, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] References to the "Transcript of Record" filed in the Court of Appeals are designated as "R." References to the Appendix to the Board's brief filed in the Court of Appeals are designated as "B.A."

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the Board could reasonably draw the inference that petitioner Union, in picketing at entrances to retail stores used by employees as well as the public, intended, at least in part, to reach the employees and, in violation of Section 8(b)(4)(A) of the Act, induce them to engage in work stoppages or refusals to perform services in the course of their employment with an object of forcing a cessation of business between the stores and another employer involved in a labor dispute with the Union.

2. Whether the Board properly found that the relationship in the instant case between a wholesale grocery concern, involved in a labor dispute with the Union, and retail grocery stores that own all of the stock of the former but do not exercise direct or immediate control over its operations, does not constitute them a single employer for purposes of Section 8(b)(4)(A) so as to entitle the Union to institute picketing at the stores which would otherwise be violative of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in Appendix E of the petition (Pet. 63).

STATEMENT

Associated Wholesale Grocery of Dallas, Inc. (Associated), a Texas corporation with its principal office and warehouse located in Dallas, is engaged in the wholesale purchase and resale of groceries and

related products (R. 94). The shares of stock issued by Associated are owned by approximately 370 retail grocery stores (R. 95). Under Associated's bylaws, its stockholders, each of which is entitled to one vote, annually elect nine directors who are vested with "complete control and management of the affairs of the Corporation" (R. 95). The directors have the power to accept or reject applications for stock ownership which is confined to "bona fide food dealers of established reputation for ethical business dealings." The directors are also empowered to revoke sales of stock to purchasers found to be ineligible "for any cause whatsoever" (B.A. 102–104).

Associated sells its merchandise only to its stockholder-stores which, however, do not make all their purchases from Associated (R. 95, 105). Since the latter does not carry all types of merchandise, it can supply at most about 31 percent of the needs of its stockholder-stores (R. 105; B.A. 28). Associated sells its merchandise at cost plus operating expenses (R. 95). All earnings in excess of such expenses are returnable as patronage dividends to stockholders in the ratio of their purchases (R. 25).[2]

On August 27, 1956, petitioner, the certified bargaining representative of the employees of Associated, called a strike of such employees in furtherance of a dispute respecting wages, hours, and other conditions of employment, and began picketing Associated's warehouse (R. 96–97). On the same day,

[2] Simril, Associated's general manager, testified that Associated is not chartered as a cooperative Association under the laws of Texas (R. 103; 76).

Associated sent a letter to its stockholder-stores expressing regret at its failure to deliver merchandise on time because of the strike, and soliciting help in loading or driving trucks until Associated could obtain replacements for the strikers (R. 97). In response, ten of Associated's 370 stockholder-stores volunteered limited assistance during the ensuing week. Eight stores supplied one employee each, and two stores supplied two and three employees, respectively. The total number of hours worked by these employees for Associated ranged from four hours to a maximum of 45½ hours. None of the retail stores supplied any employees to Associated after the first week (R. 98).

Petitioner also solicited the support of the stockholders of Associated by requesting that they refrain from assisting Associated, and urging that they purchase their groceries "elsewhere" until the dispute was settled (R. 98; B.A. 85–88). Sometime thereafter, but before October 26, petitioner on four or five occasions distributed handbills at the entrances to the retail stores of a number of Associated's stockholders and in automobiles near such stores. These handbills stated petitioner's position in its dispute with Associated, and requested recipients of the handbills to support the strike and to patronize other retail stores (R. 99–100). In addition, on October 10, petitioner published in a Dallas newspaper an advertisement which likewise stated petitioner's position and requested support of its strike (R. 99).

For the first two months, petitioner limited its strike efforts to a picket line at Associated and to

written or printed appeals for support of its strike. Beginning October 26, however, and at various times thereafter, petitioner picketed ten retail stores operated by stockholders of Associated (R. 101). The picketing took place at the front entrances of the stores which were used in common by customers, store employees, and employees of other employers supplying merchandise to the stores (R. 101–102). In the case of one of the retailers, Cliff Food Stores, picketing also occurred at the driveway to the parking lot which was used for deliveries to the back door of the establishment as well as by store customers (R. 102). Only four of the picketed stores had given assistance to Associated during the first week of the strike (R. 98).

Eight of the ten stores were picketed during the period from October 26 until November 17, the date on which the Board instituted a proceeding in a federal district court to enjoin such picketing activities (R. 101). On November 17, 1956, the two other stores were picketed, and on November 19, 1956, one of these was picketed (R. 101). The pickets carried placards which purported to be a notice to the public, stating that the employees of Associated were on strike and that the picketed store was unfair and inviting the public not to purchase merchandise obtained by the store from Associated.[1] The union also distributed handbills to the public in the vicinity of the stores

[1] The placards are reproduced in full in the opinion of the court below (Pet. 27–29).

appealing for support and urging that other stores be patronized (R. 99–101).

The Board dismissed the complaint insofar as it alleged that the distribution of the handbills to the public was violative of Section 8(b)(4)(A) of the Act (R. 75–76). The Board, one member dissenting, concluded, however, that picketing the retail stores entrances and driveways customarily used by store employees and employees of some suppliers for the purpose of forcing the store owners to cease doing business with Associated, constituted inducement of employees within the prohibition of Section 8(b)(4)(A) (R. 75). Noting the fact that petitioner did not resort to such picketing until after its appeal to consumers through distribution of handbills and a newspaper advertisement had proved ineffective, and that store employees and employees of suppliers used the picketed entrances, the Board rejected petitioner's contention that appeals solely to the consuming public were intended. The Board found that petitioner sought to achieve its objective, at least in part, through inducement and encouragement of employees of neutral employers to refuse to handle merchandise or to perform services for their employers. A majority of the Board further found that Associated and the retail stores were separate legal entities conducting a normal business relationship, and that the temporary assistance afforded Associated by a few storeowners during the first week of the strike long before the picketing began did not constitute such an alliance as would warrant direct picketing of the retail

stores. The Board concluded that the retail stores were neutral employers which Section 8(b)(4)(A) is designed to protect (R. 73–77). Accordingly, the Board ordered petitioner to cease and desist from the unfair labor practices found and to post appropriate notices (R. 78–80).

The court of appeals held that the record adequately supported the findings and inferences of the Board and, with a modification not relevant here, enforced the Board's order (Pet. 25–36).

ARGUMENT

1. Section 8(b)(4)(A) of the Act prohibits the inducement of employees of any employer to engage in a strike or concerted refusal to handle goods or perform services in the course of their employment where an object thereof is to force any employer to cease doing business with another. There is no controversy here that in picketing the retail stores, petitioner Union sought to bring about a cessation of business between the stores and Associated. The critical issue therefore is whether the Union sought to accomplish this objective solely by inducement of the public to discontinue its patronage of the stores (in which case Section 8(b)(4)(A) would be inapplicable) or whether it also intended, at least in part, to reach the employees of the stores and the employees of their suppliers and induce them to refuse to handle goods or perform services in the course of their employment for the proscribed object (in which case Section 8(b)(4)(A) does apply). The Board found that the latter was the case.

The issue here thus narrows to whether the Board could reasonably infer, as it did, from all the surrounding circumstances, that the Union's picketing of the store entrances used by the public and employees, although ostensibly directed to the former, nevertheless was intended to encompass something more than a mere appeal to the consuming public, *i.e.*, to reach the employees and induce them to give sympathetic support and assistance to the Union in its dispute with Associated. The court below held that on the record in this case the Board was entitled to draw such an inference. Essentially, therefore, the question which the case presents is of a factual nature going to the substantiality of the evidence supporting the Board's inference. The resolution of that question adversely to petitioner presents no issue warranting further review by this Court.[4]

In any event, the record adequately supports the Board's inference. As noted above, the Union decided to institute a picket line at the stores some two months after the strike at Associated began. During that interval the Union had publicized its cause, and sought to enlist public support, through newspaper advertisements and the distribution of handbills to the public at the store entrances. It was only after the response of the consuming public apparently proved ineffective to effectuate the Union's purpose that the Union began picketing at the store entrances

[4] The foregoing analysis makes clear, we think, that there is no basis for petitioner's claim (Pet. 9) that "both the Board and the court below have held that the purest consumer picketing is *per se* interdicted by Section 8(b)(4)(A) * * *."

which were used both by the public and employees. In establishing a picket line at entrances where the employees would have to cross it in order to perform their employment tasks, it is not unreasonable to conclude that the Union acted with an awareness of the "notorious" "reluctance of workers to cross a picket line" (*Printing Specialties and Paper Converters Union* v. *LeBaron*, 171 F. 2d 331, 334 (C.A. 9), certiorari dismissed, 336 U.S. 949) and with the purpose to take advantage of this "reluctance." If the Union's sole purpose had been to appeal to the public for a consumer boycott, that purpose had been, and could have continued to be, served by the newspaper advertisements and the distribution of handbills at the store entrances. In these circumstances, there is legitimate basis for the inference drawn by the Board that the picketing was, at least in part, intended to enlist the aid of neutral employees and was therefore unlawful.[5]

The ruling below is not in conflict with the decisions of the Second Circuit cited and relied on by petitioner (Pet. 12–14). In those cases, that court found that "in the particular context in which the picketing

[5] This inference is not negated by the circumstance that petitioner may have also intended to fortify its consumer appeal. The legality of one objective does not excuse the illegality of the other. Cf. *National Labor Relations Board* v. *Associated Musicians*, 226 F. 2d 900, 904, 907 (C.A. 2), certiorari denied, 351 U.S. 962. Nor is the inference precluded by the further circumstance that the picket sign appeals were ostensibly addressed to the public. While this is a factor to be taken into account, such self-serving declarations obviously cannot be decisive. The purpose of the picketing must be determined from a consideration of all the surrounding circumstances.

[took] place" there was no evidentiary basis for an inference that the picketing was intended to induce employees to engage in work stoppages. *National Labor Relations Board* v. *Local 50, Bakery and Confectionery Workers International Union*, 245 F. 2d 542, 548; to the same effect, *National Labor Relations Board* v. *Business Machine and Office Appliance Mechanics Conference Board*, 228 F. 2d 553, 560, certiorari denied, 351 U.S. 962. Cf. *National Labor Relations Board* v. *Associated Musicians, supra.* Here, the court below has concluded that a basis for that inference was present in the record. The difference is attributable not to a conflict in principle but to the differing circumstances of each case.

2. Equally insubstantial for purposes of certiorari is petitioner's further contention (Pet. 11–13) that Associated and the stores constitute a single employer for purposes of Section 8(b)(4)(A), and hence the extension of the picket line to the stores was not, in any event, violative of that Section. The record shows that Associated is a separate corporate entity with its own assets, directors, officers, and employees. The 370 retail store stockholders of Associated operate independently-owned retail stores over which Associated exercises no control. Although the retail stores, as stockholders of Associated, elect the latter's directors, this power gives the stores only potential control over Associated. Actual control is exercised by the directors who are vested with "complete control and management" of Associated's affairs, are empowered to pass upon prospective purchasers of stock, and are

even empowered to revoke sales of stock already made. Under these circumstances, where at most the retailers had only potential control over the affairs of Associated and there is no evidence that any actual control was exercised, the relationship between Associated and the retail store stockholders is plainly insufficient to constitute them a single entity for purposes of Section 8(b)(4)(A). A more realistic view is to regard Associated as a large corporation which is engaged in the wholesale grocery business and which maintains a "normal business relationship" with its retail customers. The finding of the Board, affirmed by the court below, that that relationship was within the purview of Section 8(b)(4)(A) is plainly correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

JEROME D. FENTON,
General Counsel,
THOMAS J. MCDERMOTT,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
HERMAN I. BRANSE,
Attorney,
National Labor Relations Board.
JUNE 1959.

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In the

Supreme Court of the United States

OCTOBER TERM, 1958

DALLAS GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL NO. 745,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONERS' REPLY TO BRIEF OF NLRB IN OPPOSITION

L. N. D. WELLS, JR.
1610 National Bankers Life Building,
Dallas 1, Texas.

DAVID PREVIANT,
511 Warner Theatre Bldg.,
Wilwaukee 3, Wisconsin.

HERBERT THATCHER,
Tower Building,
Washington, D. C.,
Counsel for Petitioners.

MULLINAX, WELLS & MORRIS,
GOLDBERG, PREVIANT & COOPER,
Of Counsel.

July 15, 1959.

WARLICK LAW, INC.—1207 HORD STREET—DALLAS—RI 1-6711

No. 973

In the

Supreme Court of the United States

OCTOBER TERM, 1958

DALLAS GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL NO. 745,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONERS' REPLY TO BRIEF OF NLRB IN OPPOSITION

The Board's attorneys in their opposition to certiorari take the very opposite position to that which the Board itself explicated in the decision under attack.

1.

The questions are not "of a factual nature."

Now, the Board's attorneys say, Brief in Opposition, p. 8 ff.; that the Board merely infers "*from all the surrounding circumstances*" that picketing was directed at employees rather than customers (Opp'n, p. 8); and assert "the purpose of the picketing must be determined from a consideration of all the surrounding circumstances" (Opp'n, p. 9).

Then, the Board itself said in its Decision:

"The significance of such conduct [picketing at consumer entrances] *is that it necessarily invites employees to make common cause with the strikers.*" (Emphasis added.) 118 NLRB 1253 (Petition, p. 37 ff. at 41).

And the Board specifically refused to observe and evaluate the circumstances. Thus, the Board held "picketing of consumer entrances unlawful irrespective of the literal appeal of the legends on the picket signs" (Ibid. at p. 1253, Petition, p. 41). Further, the Board held "not controlling whether or not the picketing actually 'induced or intended to induce' any employees to engage in a strike" (Ibid. at p. 1253, ftnt 6, Petition, p. 41, ftnt 6). Nor did the Board so much as mention the undisputed record facts that clearly demonstrate that the picketing was directed *only* at consumers, viz: the timing of the picketing (in response to Associated's public advertisement of retail bargains, Resp. Ex. 3); the place of the picketing (carefully avoiding "delivery" entrances, B. A. 16); the impossibility of consumers observing the earlier picketing at the Associated warehouse (in an isolated industrial area, Union App., pp. 62-63); the communication with the Butchers Union (urging retail employees to ignore the picket line, B. A. 48).

Clearly, the Board itself ignored "all the surrounding circumstances", and banned the picketing solely on the ground specifically stated in the Board's Decision, that picketing at consumer entrances "necessarily invites employees to make common cause with strikers and this is so irrespective of the literal appeal on the picket signs", 118 NLRB 1253; Petition, p. 41.

2.

Conflict between Circuits

The Board attorneys' assertion that "the ruling below is not in conflict with the Decisions of the Second Circuit * * *" (Brief in Opposition, p. 9) appears frivolous when one refers to the Board's Decision at 118 NLRB 1251 at 1253, 1254, Ftnt. 6; Pet'n, p. 41, ftnt. 6. The Board there categorically admits the conflict, viz:

> "It is sufficient, as the majority has held in * * * Arnold Bakers, 115 NLRB 1333, that the necessary effect of such conduct is to induce employees to engage in a work stoppage * * *. *Although the Second Circuit came to a contrary conclusion in that case* (NLRB v. Local 50, Bakery & Confectionery Workers Int'l Union, 245 F. 2d 542), *we* * * * *respectfully disagree.*" (Emphasis added.)

WHEREFORE, petitioners respectfully request that the Petition for Certiorari be granted.

Respectfully submitted,

L. N. D. WELLS, JR.
1610 National Bankers Life Building,
Dallas 1, Texas.

DAVID PREVIANT,
511 Warner Theatre Bldg.,
Wilwaukee 3, Wisconsin.

HERBERT THATCHER,
Tower Building,
Washington, D. C.,
Counsel for Petitioners.

MULLINAX, WELLS & MORRIS,
GOLDBERG, PREVIANT & COOPER,
Of Counsel.

July 15, 1959.

CERTIFICATE OF SERVICE

I, L. N. D. Wells, Jr., one of the attorneys for petitioners herein, and a member of the Bar of the Supreme Court of the United States hereby certify that copies of the foregoing Petitioners' Reply were this 15th day of July, 1959, served on adverse parties herein in accordance with Supreme Court Rules 21(1) and 33 by depositing the same in the U. S. Post Office at Dallas, Texas, with first class air mail postage prepaid addressed to counsel of record at his post office address, as follows:

The Solicitor General of the United States,
Department of Justice,
Washington 25, D. C.;

Jerome D. Fenton, General Counsel;

Thomas J. McDermott, Assoc. General Counsel, and

Marcel Mallet-Prevost, Assistant General Counsel

Attorneys for National Labor Relations Board,
Washington 25, D. C.

L. N. D. WELLS, JR.